Science Applications International Corporation *and* International Brotherhood of Electrical Workers, and Local Union No. 307, AFL–CIO, CFL, Petitioner. Case 5–RC–13779

October 28, 1992

ORDER DENYING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (the relevant portion of which is attached). The request for review is denied as it raises no substantial issues warranting review.[1]

[1] Review was requested of the Regional Director's findings that: (1) the petitioned-for unit is inappropriate because it includes employees who own shares in the Employer; (2) the Employer's software development employees and the VAX Systems Administrator lack a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit; and (3) that Customer Service Center Supervisor Harry Lee is not a supervisor as defined in the Act and should be included in the unit. Only the portion of the Regional Director's decision addressing the first issue is attached.

APPENDIX

[3] International Brotherhood of Electrical Workers, Local Union No. 307 (the Union or the Petitioner herein) filed a petition to represent certain employees of the Employer at its Martinsburg, West Virginia facility. As amended at the hearing, the petition seeks a unit including all hourly employees, network control operators, customer service operators, clerical employees and quality assurance employees, excluding temporary employees, managers, supervisors and security employees as defined in the Act.

There is no history of a collective-bargaining relationship between the Union and the Employer. All parties agree that the petition was timely filed and that there is no contract which bars an election.

The parties stipulated that Site Manager Robert Whiteside, Deputy Site Manager Richard Crawford, and Software Manager Frank Charrette have the authority to hire, fire, promote, discharge, discipline, lay off, and recall employees or effectively to recommend some or all of such actions and that they are supervisors properly excluded from the unit. I find, consistent with the parties agreement and in the absence of contrary record evidence, that *Robert Whiteside, Richard Crawford,* and *Frank Charrette* are supervisors within the meaning of the Act and they are *excluded* from the unit and *ineligible* to vote. The parties also stipulated that *Kimberly Mills,* the Employer's administrative assistant, is a confidential employee and properly excluded from the unit. I find, consistent with the agreement and in the absence of record evidence to the contrary, that *Kimberly Mills* is a confidential employee under the Act and is *excluded* from the unit and *ineligible* to vote.

The Employer is a scientific research and development company providing a variety of services to clients in the public and private sector. SAIC was initially founded in 1968 as Science Applications, Inc., by Dr. J. R Beyster, its current C.E.O. and Chairman of the Board of Directors. From its founding, the Employer has issued stock which has been owned almost exclusively by its employees, including directors, managers, supervisors and rank-and-file employees. Currently, there are approximately 13,000 to 14,000 employees of the Employer nationwide. Some 1200 of these are defined by the Employer as being either supervisors, managers, or directors.

The Martinsburg, West Virginia site, the only facility involved in the instant proceeding, was opened in 1989. This facility was created to provide a database and computer-related services to the Department of Veterans Affairs and the Veterans Administration on a 10-year contract. There are several civilian employees of the Veterans Administration who work at the facility, although the Employer employs approximately 26 employees at the Martinsburg site.

The contract between the Employer and the Veterans Administration requires that the Employer provide 24-hour computer-related services and assistance to users of the Veterans Administration's 65,000 computer terminals across the Country. The vast majority of employees at the facility, therefore, perform work in some area of computer assistance such as programing, troubleshooting, and analysis. In addition to clericals, there are three distinct classifications of hourly paid employees that the Union seeks to represent: they are Network Control Center Operators, Customer Service Center Operators, and the quality assurance employees.

There are eight Network Control Center Operators, six Customer Service Center Operators, and one quality assurance employee whom the Union seeks to include in the unit. While the petition seeks a bargaining unit which includes clericals, the Union takes the position that, in addition to the administrative assistant, the only other clerical employee, the receptionist, is also a confidential employee and should be excluded from the unit on that basis. The Union also takes the position that the two computer programers, the VAX (Computer) Administrator, and two ''temporary'' Customer Service Center Operators lack a community of interest with other unit personnel and should be excluded, and further, that the (Computer) Security Administrator is a security guard and should also be excluded from the unit. The Union seeks a unit of approximately 15 employees.

The unit considered appropriate by the Employer would exclude the Customer Service Center Supervisor as a supervisor but would otherwise include the receptionist, the two programers, the VAX Administrator, the two ''temporary'' operators and the Security Administrator, bringing the total unit composition to 21 employees.

EMPLOYEE OWNERSHIP OF EMPLOYER STOCK

As a threshold matter the Employer claims that no unit is appropriate for collective-bargaining representation by a labor organization due to the Employer's unique status as a wholly employee-owned company. The Employer contends that as a result of potential control over the Company by ''non-supervisory'' employees, through ownership of company stock, the employees have an effective voice in management of the Company and are, therefore, ''owners'' of the

Company who are not entitled to Section 7 representational rights. The Union, on the other hand, claims stock ownership is a mere incidental benefit of employment that does not confer on any particular individual any right or authority which would deny them the status of an employee under the Act.

The Employer originally began operating in 1968 as an ''employee-owned'' company. At that time the Employer's founder, Dr. Beyster, sought to enhance employee productivity by providing direct and exclusive stock ownership in the Company as an incentive for all its regular employees. Currently there are 44 million shares of the Employer's stock outstanding. Employees defined by the Employer as its ''Non-Managers/Non-Supervisors'' directly own approximately 21 percent of the authorized stock. Whether held in trust or owned directly, each share gives the beneficial owner a vote in certain corporate activities such as the annual election of members on the Board of Directors.

Although the Employer's stock is not publicly traded, approximately 17–18 percent of the stock is owned by nonemployees of the Employer (outsiders) such as outside directors, consultants, former employees, retired employees, and family members of the employees generally.

Through direct ownership and pension trust fund shares employees defined by the Employer as ''Managers and Supervisors'' hold approximately 32 percent of the outstanding stock. The largest block of stock owned by an individual is that of Dr. Beyster, which is approximately 900,000 shares or roughly 2 percent of the authorized stock.

All permanent employees of the Employer are entitled, and encouraged, to obtain stock in the company in a myriad of ways including direct purchase, stock options, bonuses, profit sharing, and through a variety of pension plans. Nationwide, approximately half of all the Employer's employees own at least some stock of the Company directly while up to three-quarters of the employees own voting stock ''beneficially'' through retirement plans.

At the Martinsburg facility the total number of shares owned by all 26 employees and supervisors is approximately 2343. Of these, 943 shares (or .000022 percent) are owned by employees that the Employer claims are nonsupervisory/nonmanagerial. The employees that own stock possess the benefits of such investment and also the right to vote for directors. They do not enjoy any other benefits such as preferential working conditions or career opportunities as a result of such ownership, however. Although the Board of Directors is elected to make certain executive decisions regarding the overall direction and operation of the Company, human relations and personnel matters are handled at a lower level by human relations representatives, managers, and supervisors who are not elected by the stockholders.

Although the Petitioner seeks only to represent the 15–21 unit employees at the Martinsburg facility, the parties recognized the potential for further organizational activities among the Employer's other employees nationwide. The Union acknowledges that in certain circumstances it has engaged in ''coordinated-bargaining,'' whereby various of its local unions would coordinate bargaining efforts with a single, nationwide company. The Union also conceded that it has occasionally engaged in ''coalition-bargaining'' which consists of various different labor unions engaging in a single, unified bargaining campaign, perhaps nationwide, with a single employer. There was no evidence, however, that the Union seeks to represent any of the Employer's employees other than those located at Martinsburg, West Virginia, or that it had any immediate plan to attempt coordinated-bargaining.

POSITIONS OF THE PARTIES

The Employer takes the position that collective-bargaining representation for its employees is contrary to its company philosphy and policy and that representation of the employee-owners by a labor union would create a conflict of interests. The Employer's stated philosophy is that the employees should own the Company since, as owners, they are more loyal and motivated and because they have contributed their labor to the enterprise. The Employer claims that if allowed to organize ''nationwide,'' the employees would be able to control management and otherwise face a conflict between their interests as owners and their interests as employees.

The Employer argues that employees must be excluded from a bargaining unit where they have an effective voice in company policy through stock ownership due to an inherent conflict of interests. Citing cases such as *Brookings Plywood Corp*., 98 NLRB 794 (1952), and *Sida of Hawaii, Inc*., 191 NLRB 194 (1971), the Employer urges that the Board look at aggregate shareholder strength rather than individual ownership when assessing potential control through the possession of stock. It goes on to urge that as owners of 48 percent of its shares its ''non-supervisory/non-managerial'' employees nationwide could have actual control over management through cumulative voting and could certainly have a voice in management policy through a coordinated election of directors by the ''large discrete employee group'' of its nonsupervisory employees. Citing *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182 (1992), the Employer argues that this potential control and the means to organize nationwide ''should be viewed as effective control'' notwithstanding the few shares actually owned by the employees in question who work at the Martinsburg facility.

The Union argues that the small number of shares owned by the employees it seeks to represent do not provide them any control over corporate matters. While acknowledging that the Union could possibly attempt to organize other employees across the Country or engage in coordinated bargaining with other labor unions representing employees at different locations, the Union claims it has no intention to do so at the present time.

ANALYSIS AND CONCLUSIONS

In regard to the appropriateness of collective-bargaining representation of the Employer's employees, it has long been the Board's view that the ''mere fact that an employee also has the rights and privileges of a stockholder is not sufficient to debar him from availing himself, in his capacity as an employee, of the rights of employee'' to engage in organizational activities. *Everett Plywood & Door Corp*., 105 NLRB 17, 19 (1953); *Coastal Plywood & Timber Co*., 102 NLRB 300 (1953). An individual employee or a group of employees owning stock of the Employer can be stripped of the right to pursue bargaining representation only where ''the stockholder-employee's interest is of such a nature as to give him or the stockholder group an effective voice in the formulation and determination of corporate policy.'' *Coastal Plywood*, 102 NLRB at 302. It is not simply the possession of stock but the ''degree of participation in management and/or labor

policy formulation'' that is critical. *Airport Distributors*, 280 NLRB 1144, 1150 (1986).

In addition to considering whether stock ownership provides the employee ''an effective voice in management of the company'' or places him in a position to formulate corporate policy, *Blue & White Cab Co*., 126 NLRB 956 (1960), the Board also considers whether stockholder-employees enjoy preferential treatment from other nonstockholder employees such that a ''divergence'' or lack of community of interest would be created within an otherwise appropriate unit. *Brookings Plywood Corp*., 98 NLRB 794 (1952); *Fort Vancouver Plywood Co*., 235 NLRB 635 (1978). Where the Board finds that stockholder-employees enjoy additional benefits or privileges, such as higher pay or job protection, it has excluded shareholder-employees from other bargaining units due to a lack of a community of interest. *Fort Vancouver Plywood*, 235 NLRB at 644–645; *Brookings Plywood*, 98 NLRB at 798–799.

The determination of the degree of participation in corporate management rests primarily on the amount of control possessed by the proposed unit through the proportional ownership of stock. For example, in *Red & White Airway Cab Co*., 123 NLRB 83 (1959), and *Fort Vancouver Plywood*, 235 NLRB at 635, shareholder-employees owned 100 percent of the employers' stock, served on the board of directors, and were therefore precluded from participation in a bargaining unit. In *Sida of Hawaii, Inc*., 191 NLRB at 194, a group of employees owning a majority of the employer's stock was excluded from a bargaining unit of nonshareholders on the basis of their control of the company through election of, and direct participation on, the board of directors. *Brookings Plywood*, 98 NLRB at 798–799, employees owning a near majority (47 percent) of the employer's stock were similarly excluded from a bargaining unit of nonstockholders due to their ''influence'' over management policies as well as their preferential treatment.

Where an employee or group has actual control over corporate matters through ownership of all or a majority of an employer's stock their control over management affairs will ordinarily serve to bar them from participation in a bargaining unit. However, in *Everett Plywood*, 105 NLRB at 19, shareholder-employees owned 365 of 480 shares (76 percent) but were not barred from collective-bargaining representation as there were no other nonstockholder employees whose interests might be divergent, and the stockholders' interest as paid workers were ''at least as great'' as their interest as proprietors. Employee-stockholders may also be excluded from the protections of the Act where they possess or seek an ''effective voice'' in management or participate directly in corporate policy formulation through membership on an employer's board of directors. *Blue & White Cab Co*., 126 NLRB at 956; *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182.

In circumstances where a group of employees own less than a majority of an employer's stock and otherwise have no voice in management they are afforded full representational rights.

In *S-B Printers*, 227 NLRB 1274 (1977), a group of employee-shareholders owned 25 percent of the employer's stock and was found not to possess ''an effective voice'' as there was no showing that they voted as a block or that concerted voting would provide a controlling interest or merely an ''ineffective minority.'' 227 NLRB at 1275. *Coastal Plywood* and *Blue & White Cab Co*. also stand for the same proposition: where employees own a minority interest in their employer's stock (20 percent and 6 percent respectively) the employees will not be barred from exercising Section 7 rights absent other indicia of control over management. *Coastal Plywood*, 102 NLRB at 301; *Blue & White Cab Co*., 126 NLRB at 957. In another case a 10-percent stockholder employee who sat on the board of directors, but was a nonparticipating member, was found not to have participated in the formulation of policies involving management or employee relations and was not excluded from the protections and rights afforded by the Act. *Airport Distributors*, 280 NLRB at 1150.

In the present case the Petitioner seeks to represent a minute fraction of the Employer's approximately 14,000 employees nationwide. Although these employees are ''eligible'' to purchase as many shares as they can afford, provided the Employer consents, the fact is that their current holdings account for far less than 1 percent of the Employer's overall outstanding shares of stock. In the circumstances, it is my conclusion that these employees have no effective voice in management or corporate policy-making through possession of such an insignificant number of shares. I also conclude that none of the members of the proposed unit participate directly on the Employer's board of directors, or receive any special privileges or rights by virtue of their stock ownership.

The Employer contends that it is not simply the interests of these few employees that are at stake. The Employer claims that there is the ''potential'' that all nonsupervisory employees nationwide could organize. If they did so, the Employer suggests, they could easily place a director on the Employer's board ensuring at least a ''voice'' in management and, under certain circumstances, could actually gain control of the board through cumulative voting.

While the Employer's theory of potential control, if carefully extrapolated to its logical end, could lead to a near majority of employees exerting influence over the Employer's corporate affairs, such a conclusion rests on numerous unproved and unlikely asssumptions. If all of the Employer's approximately 13,000 ''non-manager/non-supervisor'' employees were in fact ''employees'' under the Act; if they all constituted a single appropriate unit; and if they all organized and all voted together in corporate matters, they may very well be able to influencoe or even control corporate policy. There is, however, no evidence to suggest that any of those assumptions is in fact the case. While these possibilities could at some point come to pass, there is no factual or evidentiary basis showing even the most remote probability of such events ever occurring.

Accordingly, there is no evidence whatsoever to support the Employer's claim that giving these employees the right to choose collective-bargaining representation is tantamount to giving all its nonsupervisory employees a seat on both sides of the bargaining table.

In *Richfield Oil Corp*., 110 NLRB 356 (1954), enfd. 231 F.2d 717 (1956), the Board handled a similar argument by an employer that permitting a union to bargain over employee stock ownership:

> could result in the union's obtaining a seat on both sides of the bargaining table representing employees in

> their capacity as employees on the one side and as stockholders on the other, and could lead to substantial interference with, and perhaps control over management by the union.

110 NLRB at 362. As the Board further pointed out, such ''dire consequences are more illusory then real.'' They are ''theoretical consequences which have constantly failed to materialize in the practical atmosphere of the bargaining process.'' 110 NLRB at 363–364. I find that the consequences predicted by the Employer in this case are mere speculation, without any evidentiary support, and I shall not disenfranchise these employees on such a basis.

The Employer contends that there are no Board cases which directly address the issue it raises, namely, that potential control is effective control. The conclusion it urges, however, is not supported by prior law. The Employer relies heavily on *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182, where an employee effort to gain 50 percent of its employer's stock in order to manipulate managerial control was found not to be protected activity under the Act. The *Harrah's* case arose out of an attempt to gain control over management through majority control of stock by a unified group of employees. It was not the possession of stock which was at issue. Rather, the Board concluded that the ends sought by the employees—managerial control through stock ownership—was unprotected. Here there is evidence the Martinsburg employees have any interest at all in effecting changes in management hierarchy. Nor, again, is there evidence that employees have acted concertedly with or even share the same interests as those that the Employer refers to generally as ''non-managers/non-supervisors.'' The Board does appear to have considered the issue of ''potential control'' by minority shareholder employees. In *S-B Printers*, 227 NLRB at 1274–1275, the Board concluded that even where there was a 25 percent ownership by the proposed unit employees and cumulative voting, nevertheless the employees were not shown to have had an effective voice where they were not shown to have voted as a block. Clearly, the potential for a voice was there. It is not the mere potential, however, for a voice or control that is significant. Rather, it is actual control or an effective voice in formulation and determination of corporate policy. It is my conclusion that the Martinsburg employees in the unit found appropriate do not have an effective voice in corporate affairs. Nor am I persuaded that the potency of their stock interest is of such a nature as to deprive them of their statutory rights, as employees, to representation by a labor organization if they choose to do so in a secret ballot election.